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No. 91-1589

Supreme Court, U.S.
FILED
APR 30 1992
OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1991

GEORGE SWAMP, *et al.*,

Petitioners,

v.

KEVIN KENNEDY, individually and as Executive Director, Wisconsin State Board of Elections, *et al.*,

Respondents.

BRIEF OF *AMICUS CURIAE* PUBLIC CITIZEN IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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April 30, 1992

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Interests of Amicus Curiae

Public Citizen, a nationwide consumer advocacy organization with over 140,000 members, over 2,000 of whom are residents of Wisconsin, files this brief because, if allowed to stand, the ruling below will adversely affect the ability of our members to support minor party candidates for public office.[1] Like the rest of the American electorate, many of Public Citizen's members are either independent voters or voters who, although registered as Democrats or Republicans, at times prefer to support minor

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[1] Public Citizen files this brief with the consent of the parties. Letters of consent have been lodged with the Clerk.

parties. The decision under review sustained the constitutionality of a Wisconsin statute that prohibits multi-party nominations ("MPNs"), *i.e.*, the nomination of a single candidate, in the same election and for the same office, by more than one party, and thereby restricts the ability of minor parties to be full participants in the political process.

The court below upheld the MPN ban because it viewed the state's interest in maintaining the stability of the political system to be more compelling than the interests of minor parties to choose their own standard-bearers. We agree with the petitioners that this case warrants review because the state has no valid interest in dictating to a political party what candidates it can and cannot nominate. We file this brief, however, because the petition focuses principally on the *party*'s interest in having the MPN ban overturned. Our concern is with the detrimental impact that MPN bans have on *voter* choice, a perspective not fully developed by petitioners.

As we show, MPN bans often force voters into a Hobson's choice: they can either "waste" their vote by supporting a *party* that stands for principles with which they agree but whose candidate has no realistic prospect of winning, or they can vote for an electable major party candidate even though they do not support the party's platform. Imposition of this choice violates voters' First Amendment associational interests, as well as those of the minor parties they would support but for the MPN ban. MPN bans cannot be justified on the grounds that they serve compelling state interests; as Circuit Judges Ripple, Posner, and Easterbrook pointed out in their dissent from the denial of rehearing *en banc*, the major parties erected MPN bans for one purpose -- to preserve their positions of dominance, not to serve the public. At a time when increasing numbers of voters are dissatisfied with existing institutions, restraints on voter choice should not be sustained on the basis of the parochial interests of the major parties. For this reason as well, this case merits plenary review.

Statement of Facts

As is recounted fully in the petition, this case involves a First

Amendment challenge by the Wisconsin Labor Farm Party and two of its members to Wisconsin's ban on multiple-party nominations. The Labor Farm Party brought this action after the State Board of Elections refused to permit Labor Farm to place Douglas LaFollette's name on the Party's primary ballot for the office of Secretary of State, with his express consent, solely because Mr. LaFollette was already seeking the Democratic Party nomination to the same office.

Both lower courts rejected Labor Farm's First Amendment challenge, reasoning that it remained free to support Mr. LaFollette (even though it was forbidden from having him as its standard-bearer) or to nominate another candidate of its choice. The courts also reviewed the state interests asserted in defense of the MPN ban and found them compelling. Among others, the courts found that the MPN ban furthers the valid state goals of 1) maintaining the stability of the political system by ensuring that the general election winner captured a majority or plurality of the votes and 2) encouraging the parties to preserve distinct ideologies and platforms.

REASONS FOR GRANTING THE WRIT

We agree with petitioners that the ruling below warrants review because the core issue presented -- whether a state can legitimately forbid a political party from nominating the candidate of its choice simply because that candidate is also the choice of another party -- is a substantial one with nation-wide implications. We also agree with petitioners that the MPN ban has a disproportionate and highly adverse impact on minor parties. The inability to nominate a candidate who is also nominated by a major party substantially hinders the ability of minor parties to form alliances and coalitions with major parties. In states where MPN is permitted, if a candidate who is supported by both a major and minor party prevails because of the votes cast on the minor party line, an important message is sent to both the candidate and to the parties -- a message that could well influence the major party's platform, the candidate's performance in office, and give rise to useful and mutually beneficial political alliances between

major and minor parties. *See* Pet. App. C., at 22a-23a.[2]

MPN bans prevent voters from sending that message, and hence they violate voters' First Amendment associational rights. This Court has long made clear that state election laws that unduly restrict a voter's freedom of choice may impinge on freedom of association so as to run afoul of the First and Fourteenth Amendments. *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973); *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). This is such a case. In states that prohibit MPN like Wisconsin, voters who do not subscribe to the platform or ideology of one of the two major parties will be forced to sacrifice their associational interests every time they vote, unless they opt to waste their vote on an unelectable candidate. They can either vote for the *candidate* of their choice and be compelled to associate with a party they do not support, or they can associate with the minor party of their choice by wasting their vote on a candidate who is almost certain not to be elected. MPN bans thus forbid voters from doing what they want, what the minor party wants, and what the candidate is perfectly willing to accept: namely, vote for the candidate of their choice on the party line of their choice. This Hobson's choice violates the settled principle that the state may not require its citizens to forego the exercise of one fundamental right to enjoy another, absent the most compelling justification, which is lacking here. *Elrod v. Burns*, 427 U.S. 347 (1976); *Dunn v. Blumstein*, 405 U.S. 330, 342 (1972); *see also United States v. Roberts*, 468 U.S. 609, 623 (1984).

The gravity of this problem is underscored by the fact that, although the MPN ban is designed to preserve the dominance of

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[2] As the *amicus* brief submitted by the New York Conservative and Liberal Parties makes clear, voters want this choice. For instance, a longstanding Democratic voter who is disenchanted with the party's nominee might not want to vote for a candidate running on the Republican ticket. But that voter might well support the same candidate running on a third-party slate. This scenario is played out all the time in New York, where voters can indicate their disagreement with the major parties by voting for the candidate they prefer on the Conservative or Liberal line, without wasting their vote. Because of the influence of these minor parties, the major parties and their candidates must be vigilant to forge coalitions with the minor parties and to shape their platforms in a way that accommodates the interests of these parties.

the two major parties, we are now entering an era in which the American electorate is moving away from party loyalty. In fact, independent voters are fast becoming the major segment of the voting public. N. Nie, S. Verba & J. Petrocik, THE CHANGING AMERICAN VOTER 49 (Harv. Univ. Press 1976)("Nie"); *see also* L. Mulcahy & R. Katz, AMERICA VOTES 46 (Prentice-Hall 1976) ("Mulcahy"). For a variety of reasons, over the past two decades, the ranks of independent voters have steadily grown to the point where now 38% to 40% of the voters across the country term themselves "independent." Nie at 49; Mulcahy at 46. That figure equals the number of voters who call themselves "Democrats" and far outstrips the number who consider themselves "Republicans." *Id.* For younger voters, the movement away from the major parties is even more pronounced: 45% of the voters nationwide under 30 years of age are independents. Nie at 64; Mulcahy at 46.

Two characteristics mark this segment of the electorate. First, the attitudes of contemporary voters indicate that they are more politically sophisticated than the independent voters of earlier years. "They reject the party system consciously as a response to political events, while remaining interested and continuing to vote . . . [T]he new independence has emerged among the young, well-educated voters largely as a response to issues." Mulcahy at 48; *see* Nie at 94-95. Second, because of this sophistication, and because voters' political attitudes toward the parties are adopted early in life and become more fixed over time, these voters are unlikely to surrender their independence for partisanship. Mulcahy at 48; Nie at 94-95. Thus, the voters most directly affected by the MPN ban -- those most likely to consider supporting minor parties while not wanting to "waste" their votes -- represent a large, distinct group likely to have a continuing influence on the shape of American politics. It is this group that is especially penalized by the MPN ban at issue here.

Because of the adverse impact MPN bans have on the associational rights of minor parties and on the voters who would be willing to support minor parties in the absence of such bans, this Court's jurisprudence makes it clear that the ban may be sustained if, but only if, the state can affirmatively establish that the

ban is narrowly tailored to serve a compelling interest. *Elrod v. Burns*, 427 U.S. at 362; *Kusper v. Pontikes*, 414 U.S. at 58. Labor Farm's petition addresses the reasons why there is no nexus between the ban and the interests asserted in its defense. But, because two of the state's arguments are couched in voter-protection terms, we address them briefly here.

First, a ban on MPN does nothing to further the principal interest asserted by the state and relied on by the courts below, namely, protecting voters by ensuring the stability of the political process. MPN bans do this, the argument goes, by seeing to it that general election winners have the support of a majority or at least a plurality of the voters. *See* Pet. App. A, at 5a; Pet. App. B., at 15a. We do not dispute the legitimacy of a state's interest in avoiding factionalism, but that interest is not served by a ban on MPN. In fact, MPN bans *encourage* factionalism, since minor parties have no incentive to forge coalitions and alliances with major parties through joint support of a common standard-bearer. Rather, with a MPN ban in force, minor parties have no choice but to place their own candidates on the ballot and to try to drain as many votes as possible away from their major party rivals, which lessens the likelihood that any one candidate will capture a majority.

Second, there is no basis for the assertion that MPN bans help sharpen the political messages delivered to the voters. This argument was embraced in Judge Fairchild's concurrence below, which argues that a state may legitimately seek to "maintain[] the distinct identity of the parties," and that MPN threatens that interest because "the distinct identities of parties will be blurred if persons are permitted to present themselves as the candidate of more than one party." Pet. App. A, at 10a. There are two problems with this argument. To begin with, it rests on the flawed premise that MPN bans somehow encourage parties to keep their ideologies and platforms distinct and well-defined. That is hardly the case. With the absence of serious competition from minor parties, the major parties are free to keep their goals and principles vague and indeterminate in order to attract the widest possible public support. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 70 (1976) (*per curiam*); *Rosario v. Rockefeller*, 410 U.S. 752, 769-70 (1973); *Williams v. Rhodes*, 393 U.S. 23, 33 (1968). If party

"distinctness" is a laudable goal, it is not being served by MPN bans.

In fact, it is likely that lifting MPN bans would sharpen the parties' political messages. With MPN, the *parties* as well as the candidates will be in competition for voters, and hence will have to hone their platforms and ideologies. If both a major and minor party believe that the same person is the best candidate and form an alliance to get that candidate elected, that alliance speaks volumes to voters; it is also vitally important to the candidate and the parties to know which party platform is favored by the voters. That information would, in turn, be used by parties to refine and fine-tune their message to enlist even greater public support for their cause.

As is evident, the issues raised by the petition strike at the heart of the American political process. This case does not simply concern the ability of minor parties to be full participants in the electoral process; it also involves the right of voters to choose both the candidates and the party platforms that best reflect their views on the vital political issues of the day. Nor does the decision below affect only Wisconsin. Rather, unless reversed by this Court, the ruling below etches the Wisconsin statute -- and the thirty or forty more like it -- in stone, because the dominant parties that control the statehouses are the *beneficiaries* of the ruling, and will certainly not act to overturn it. Similarly, the ruling below casts a shadow in those states that currently permit MPN, because it tells the dominant parties that it is perfectly permissible to erect MPN bans and thereby weaken their minor party opponents. For these reasons, this case is simply too important to go unreviewed.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be granted, and this case should be set down for briefing and argument.

Respectfully submitted,

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